



DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Food and Drug Administration  
Rockville MD 20857

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Re: Surpass  
Docket No. 04E-0389

The Honorable Jon Dudas  
Under Secretary of Commerce for Intellectual Property and  
Director of the United States Patent and Trademark Office  
Box Pat. Ext.  
P.O. Box 1450  
Alexandria, VA 22313-1450

APR 8 2005

Dear Director Dudas:

This is in regard to the application for patent term extension for U.S. Patent No. 4,937,078 filed by Mezei Associates, Ltd. under 35 U.S.C. § 156. The animal drug product claimed by the patent is Surpass (diclofenac sodium), which was assigned NADA No. 141-186.

A review of the Food and Drug Administration's official records indicates that this product was subject to a regulatory review period before its commercial marketing or use, as required under 35 U.S.C. § 156(a)(4). Our records also indicate that it represents the first permitted commercial marketing or use of the product, as defined under 35 U.S.C. § 156(f)(1), and interpreted by the courts in *Glaxo Operations UK Ltd. v. Quigg*, 706 F. Supp. 1224 (E.D. Va. 1989), *aff'd*, 894 F.2d 392 (Fed. Cir. 1990).

The NADA was approved on May 13, 2004, which makes the submission of the patent term extension application on June 7, 2004, timely within the meaning of 35 U.S.C. § 156(d)(1).

Should you conclude that the subject patent is eligible for patent term extension, please advise us accordingly. As required by 35 U.S.C. § 156(d)(2)(A) we will then determine the applicable regulatory review period, publish the determination in the *Federal Register*, and notify you of our determination.

Please let me know if we can be of further assistance.

Sincerely yours,

Jane A. Axelrad  
Associate Director for Policy  
Center for Drug Evaluation and Research

cc: Paul E. Dietze  
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Washington, DC 20004

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